80-1793

FILED
APR 21 1981
ALEXANDER L. STEVAS,
CLERK

NO._____

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

THOMAS RANDALL WATSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

* * *

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

* * *

PETITION FOR A WRIT OF CERTIORARI

* * *

Stanley B. Sikes
John W. Kelly, III
P.O. Box 1308
Selma, Alabama 36701
(205) 872-6207

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of the trial court to note *sua sponte*, the obvious inadequacy of petitioner's legal representation constituted plain error which was properly before the Alabama Court of Criminal Appeals on petitioner's direct appeal from his judgment of conviction.

2. Whether the failure of the Alabama Court of Criminal Appeals to note and consider, *sua sponte*, the obvious inadequacy of petitioner's legal representation as plain error apparent on the record of the trial proceedings constituted error and denied petitioner his Fourteenth Amendment right to due process of law.

3. Whether the failure of the Alabama Court of Criminal Appeals to permit issues going to adequacy of legal representation to be raised for the first time on appeal constitutes abridgment of the Sixth Amendment guarantee of adequate legal assistance and of the Fourteenth Amendment guarantee of due process of law.

TABLE OF CONTENTS

Questions Presented 1
Table of Contents 3
Table of Authorities 4
Opinions Below 7
Jurisdiction 7
Constitutional Provisions Involved 8
Statement of the Case 9
Argument 15
Conclusion 22
Certificate of Service 23

PRECEDING PAGE WAS BLANK

TABLE OF AUTHORITIES

CASES:

Boyd v. State, 361 So.2d 1179 (Ala.Cr.App. 1978) 19,20

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708,___L. Ed.2d___(1980) 17

Ex parte Oglesby, 337 So.2d 381 (Ala. 1976) 10

Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) 21

Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir.) cert. den., 434 U.S. 845, 98 S.Ct. 148, 54 L.Ed.2d 111 (1977) 17

Johnson v. United States, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943) 18

Lakeside v. Oregon, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) 20,21

McMann v. Richardson, 397 U.S. 559, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) 17,21

Murry v. State, 367 So.2d 985 (Ala.Cr.App. 1978), cert. den., 367 So.2d 989 (Ala. 1979) 10

Oates v. State, 375 So.2d 1285 (Ala.Cr.App. 1979) 12

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) 17,21

Rickenbacker v. Warden, 550 F.2d 62 (2nd Cir. 1976), cert. den., 434 U.S. 826, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977) 17

Robertson v. State, 29 Ala.App. 399, 197 So. 73, cert. den., 240 Ala. 51, 197 So. 75 (1940) 13

Silber v. United States, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798 (1962) 18

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) 21

United States v. Atkinson, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936) 18

United States v. Aulet, 618 F.2d 182 (2nd Cir. 1980) 18

United States v. DeCoster, 624 F.2d 196 (D.C.Cir. 1976) 19

United States v. Kazni, 576 F.2d 238 (9th Cir. 1978) 18

United States v. Ramirez, 535 F.2d 125 (1st Cir. 1976) 17

United States v. Stephens, *609 F.2d 230* [*5th Cir.* 1980) 18

Wilder v. State, 52 Ala.App. 157, 290 So.2d 225 (1974) 12

Williams v. State, 342 So.2d 1328 (Ala. 1977) 13

MISCELLANEOUS:

28 U.S.C. §1257(3) 7

Alabama Rules of Appellate Procedure 10 (f) and 10 (k) 14

§12-22-240, *Code of Alabama*, 1975 14,19

* * *

The petitioner, Thomas Randall Watson, respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Alabama entered on October 7, 1980.

* * *

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, not yet reported, appears in the Appendix hereto. The Supreme Court of the State of Alabama denied certiorari in the case submitted for review to this Court, noting that the petitioner had not employed applicable Alabama Rules of Procedure to present the issue asserted in his petition for Certiorari and stating that it was compelled to deny his petition. The opinion of the Alabama Supreme Court, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Alabama Court of Criminal Appeals was entered on October 7, 1980. Timely application for rehearing was denied on November 25, 1980. Timely petition for certiorari to the Alabama Supreme Court was denied on February 20, 1981, and this petition for Certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner seeks review of a judgment convicting him for perjury and sentencing him to imprisonment for three years.

The petitioner was tried under an indictment alleging that petitioner had falsely sworn under oath during the taking of an oral deposition in a civil slander suit that petitioner had not had a telephone conversation with one M.M. Kennedy, Jr. on July 21, 1978, wherein certain statements were allegedly made by petitioner. (App. 31) At trial and on appeal, the petitioner was represented by retained counsel.

During the course of the trial, the State called three witnesses. Mr. M.M. Kennedy, Jr., the chief State's witness, testified as to his recollection of a telephone conversation with the petitioner on July 21, 1978, and of the statements allegedly made during that conversation. Mr. Kennedy testified that a State agent was present with Kennedy during the alleged telephone conversation and made a tape recording of the conversation. (App. 32)

The State agent present with Mr. Kennedy during the telephone conversation was Mr. H.E. Mitchell, a Sergeant in the Alabama Department of Public Safety. Sergeant Mitchell, the second witness called by the State, testified that he had tape recorded the conversation in question, and that it contained the voices of Kennedy, the petitioner, and another participant. (App. 33) At the conclusion of Sergeant Mitchell's testimony on direct examination, the State offered the tape into evidence whereupon the petitioner's counsel objected and asked to examine Sergeant Mitchell on voir dire outside of the presence of the jury.

On voir dire examination by petitioner's counsel, Sergeant Mitchell admitted that he could not identify the voices on the tape recording through his own independent knowledge, and that his identification of the voices was based on hearsay. (App. 34) The petitioner's trial counsel made no motion to exclude Sergeant Mitchell's testimony identifying the voices. During Sergeant Mitchell's

cross-examination in the presence of the jury, petitioner's counsel again failed to make any motion to exclude Sergeant Mitchell's testimony and proffered no questions to Sergeant Mitchell concerning his voice identification. The tape recording of the conversation was subsequently admitted into evidence by the trial court. (App. 34)

The tape recording of the telephone conversation was played for the jury and, during the playing of the tape recorded conversation, each juror was given a copy of a transcript of the conversation to read while listening to the tape recording. (App. 37) Although the trial judge had ruled that the transcription of the tape constituted hearsay of the "rankest kind" (App. 36), petitioner's counsel made no objection to the jury being furnished with a copy of the transcription, and stipulated that the transcript of the tape recording could be furnished to each member of the jury without the necessity of any further proof as to its correctness. (App. 36&37) The transcript identified the speakers by name. The tape recording and transcription thereof were the only evidence corroborating the testimony of Mr. M.M. Kennedy, Jr. as required by Alabama law. [1]

Subsequent to the alleged July 21st telephone conversation, the petitioner had filed a civil slander suit against M.M. Kennedy, Jr. (App. 32). During the course of the civil proceedings, the petitioner's oral deposition was taken before Ms. Betty J. Maurer, a shorthand reporter authorized under law to administer oaths. Ms. Maurer, the final State's witness, testified that she had placed the petitioner under oath and taken the petitioner's deposition on November 2, 1978, and that she had prepared a transcription of the deposition. (App. 35) Ms. Maurer identified and read the questions and answers in the petitioner's deposition which formed the basis of the indictment. At the conclusion of Mrs. Maurer's testimony, the State rested.

---

[1] **Ex parte Oglesby**, 337 So.2d 381 (Ala. 1976) and **Murry v. State**, 367 So.2d 985 (Ala.Cr.App. 1978), cert. den., 357 So.2d 989 (Ala. 1979), hold that a conviction of perjury must be sustained by the testimony of two witnesses to the corpus delicti or one witness with strong corroborative evidence.

Petitioner's counsel briefly recalled Mr. M.M. Kennedy, Jr., as the only defense witness. Immediately upon the conclusion of Mr. Kennedy's testimony, petitioner's counsel rested his case, and the court instructed the parties to proceed with closing argument to the jury. (App. 37)

During his closing argument the petitioner's counsel apologized to the jury, to petitioner, and to co-counsel for his "snap decision" in resting petitioner's case and in failing to confer with petitioner and with co-counsel, stating as follows:

> "(Petitioner's Counsel): . . . I hope you won't hold any mistakes that I have made or Mr. Melson (Co-counsel) has made against Randall (Petitioner). I would like to apologize to Mr. Melson and Randall also for my snap decision that I made in resting our case. I should have conferred with them but I . . .
>
> (State's Counsel) We object. That has absolutely . . .
>
> THE COURT: I will sustain the objection. Mr. Hardin, that's not permissible argument." (App. 37).

After the foregoing exchange the State's counsel offered to allow the petitioner to reopen his case, at which time petitioner's counsel objected and asked for a mistrial, which was denied. (App. 37)

The trial jury began deliberations on the morning of June 8, 1979, and on the afternoon of June 8, 1979, advised the trial court that they were deadlocked. (App. 38) The trial court charged the jury of their duty to agree on a verdict and the jury continued its deliberations until 6:15 o'clock p.m. on June 8, 1979. The jury returned at 8:00 a.m. the following day and resumed deliberations. Finally, the trial jury reached a guilty verdict on the afternoon of June 9, 1979. (App. 41)

Petitioner's trial counsel filed a motion for a new trial on July 18, 1979, alleging, in grounds 56 and 57, that members of the petit jury panel had failed to respond to voir dire

questions asked during jury selection,[2] and that certain members of the jury made improper statements during deliberations. (App. 25) Petitioner's trial counsel also filed a motion for leave to subpoena the petit jurors alleging that one juror had stated, during deliberations, that he had known the petitioner all of his life and that the petitioner had always been in trouble with the law, and alleging that the improper response of this juror during voir dire examination had denied the petitioner his Constitutional right to trial by fair and impartial jury. (App. 27) Petitioner's counsel later amended his motion for leave to subpoena jurors alleging further juror improprieties. (App. 28) All post trial motions were denied by the trial court. (App. 17)

Petitioner's trial counsel participated in petitioner's direct appeal to the Alabama Court of Criminal Appeals. In his appeal the petitioner argued, inter alia, that his conviction was due to be reversed because it was based on the uncorroborated testimony of the State's witness, M.M. Kennedy, Jr. The Court of Criminal Appeals held that Mr. Kennedy's testimony was corroborated by the tape recording of the alleged conversation with the petitioner, and noted that petitioner: (1) had made no motion to exclude Sergeant Mitchell's testimony identifying the voices; (2) had proffered no questions concerning Sergeant Mitchell's voice identification during cross-examination in the presence of the jury; and, (3) concluded that petitioner's counsel had not preserved error by his failure to make timely and appropriate objections or to move to exclude the witness's testimony.[3] (App. 6)

---

[2]These questions, which are set out in the appendix hereto (at p. 30), pertained to the jurors' knowledge of the petitioner and whether they held any opinion of petitioner which might bias their verdict.

[3]Hearsay testimony admitted without objection becomes lawful evidence. **Wilder v. State**, 52 Ala.App. 157, 290 So.2d 225 (1974). Where cross-examination develops that the witness's testimony on direct examination is based on hearsay, the defendant's remedy is to move to exclude the evidence from the jury. **Oates v. State**, 375 So.2d 1285 (Ala.Cr.App. 1979).

The Court of Criminal Appeals further observed that petitioner's trial counsel never objected to furnishing the jury with copies of the transcript which identified the speakers by name, and that petitioner's trial counsel had stipulated that the transcription which included the names of the speakers accurately reflected the information on the tape recording. (App.7&8) The court concluded its observation on this point by stating that: "The trial judge gave the defendant every opportunity to object to both the accuracy and the admissibility of the transcription, but no objections were made." (App. 8)

In response to the petitioner's contention that members of the jury panel failed to respond to pertinent voir dire questions, the Alabama Court of Criminal Appeals ruled that the petitioner's motions for new trial and to subpoena jurors were properly denied because petitioner's counsel had failed to comply with Alabama cases holding that a motion challenging the qualifications of individual jurors -- filed after the commencement of trial -- must allege that the grounds for the motion were not known to the defendant before he went to trial or that he could not have known them by exercising due diligence.[4] (App.17&18)The Court of Criminal Appeals further held that defendant was not entitled to examine a juror whose affidavit had been filed by the State because, again, the defendant had failed to comply with Alabama law relative to the challenging of individual jurors. (App.18)

Finally, the Court of Criminal Appeals, noted that it was at a "particular loss" in reviewing the trial court's order denying the petitioner's motion for a new trial because the particulars of that hearing were not reported. Because of the failure of petitioner's counsel to present a complete record, the Court applied the presumption that the trial court's ruling denying the motion for a new trial was correct.[5] (App.18&19)The Court of Criminal Appeals noted

---

[4]See **Williams v. State**, 342 So.2d 1328, 1329 (Ala. 1977).

[5]This presumption is applied as to matters not shown in the record pursuant to **Robertson v. State**, 29 Ala.App. 399, 197 So. 73, cert. den., 240 Ala. 51, 197 So. 75 (1940).

that while petitioner had filed a motion to correct the record, the matter was never presented to the trial judge for a ruling. (App. 19)

Petitioner's trial counsel also participated in the filing of a petition for writ of certiorari to the Alabama Court of Criminal Appeals in the Supreme Court of Alabama based on the issue of juror impropriety. The writ was denied by the Alabama Supreme Court which stated that it was "compelled" to deny the petition because petitioner's counsel had failed to employ appropriate Alabama Rules of Appellate Procedure to present the issues asserted in the petition.[6] (App. 21)

The issue of the inadequacy of petitioner's counsel was not raised on petitioner's direct appeal to the Alabama Court of Criminal Appeals. That court concluded, however, that it had "searched the entire record for error as required by law and found no prejudicial error."[7] (App. 19) The petitioner herein asserts that the Court of Criminal Appeals erred by failing to observe, *sua sponte*, the obvious inadequacy of petitioner's counsel which constituted plain error apparent on the record.

---

[6]Alabama Rules of Appellate Procedure 10(f) and 10(k) (App. 23&24) provide the method by which petitioner's counsel could have properly raised the issue for review on certiorari in the Alabama Supreme Court. They were not employed.

[7]The Court of Criminal Appeals is required, by §12-22-240, **Code of Alabama**, 1975, to search the record for error. This statute is included in the appendix hereto (at p. 22).

ARGUMENT

THE FAILURE OF THE ALABAMA COURT OF CRIMINAL APPEALS TO NOTE AND CONSIDER, *SUA SPONTE*, THE OBVIOUS INADEQUACY OF PETITIONER'S LEGAL REPRESENTATION AS PLAIN ERROR ABRIDGED PETITIONER'S SIXTH AMENDMENT GUARANTEE OF EFFECTIVE LEGAL ASSISTANCE.

THE FAILURE OF THE ALABAMA COURT OF CRIMINAL APPEALS TO PERMIT ISSUES GOING TO ADEQUACY OF LEGAL REPRESENTATION TO BE RAISED FOR THE FIRST TIME ON APPEAL CONSTITUTES ABRIDGMENT OF THE SIXTH AMENDMENT GUARANTEE OF ADEQUATE LEGAL ASSISTANCE AND OF THE FOURTEENTH AMENDMENT GUARANTEE OF DUE PROCESS OF LAW.

THE FAILURE OF THE TRIAL COURT TO NOTE, *SUA SPONTE*, THE OBVIOUS INADEQUACY OF PETITIONER'S LEGAL REPRESENTATION CONSTITUTED PLAIN ERROR WHICH WAS PROPERLY BEFORE THE ALABAMA COURT OF CRIMINAL APPEALS ON PETITIONER'S DIRECT APPEAL FROM HIS JUDGMENT OF CONVICTION.

The petitioner was represented at trial by incompetent counsel. The record of the trial proceedings and the opinion of the Alabama Court of Criminal Appeals establish that the petitioner failed to receive adequate and effective legal assistance from his retained trial counsel at critical points during the trial and post-trial proceedings. The critical points apparent on the record include:

1. The failure of trial counsel to object to or move to exclude the voice identification made by the State's witness, H.E. Mitchell, after his testimony established that

the voice identification was based on hearsay. This failure led to the admission of a tape recording into evidence which constituted the only corroboration of the testimony of the chief prosecution witness.

2. Trial counsel's stipulation that a transcribed copy of the tape recording could be furnished to each juror to read while listening to the tape recording after the trial court had ruled that the transcript constituted hearsay of the "rankest kind." The transcript, not otherwise admissible without trial counsel's stipulation as to its correctness and admissibility, identified the petitioner by name as one of the participants in the conversation and further corroborated the testimony of the chief prosecution witness.

3. Trial counsel's admitted "snap decision" in resting petitioner's case without first conferring with the petitioner or with co-counsel. This snap decision prevented the petitioner from effectively participating in the defense of his case.

4. Trial counsel's failure to comply with requirements of Alabama cases in post-trial motions attacking the qualifications of jurors for their failure to respond to pertinent voir dire questions and infecting the verdict with prejudice against the petitioner.

5. Counsel's failure to preserve a record of post-trial proceedings for review by the Alabama Court of Criminal Appeals or to correct the record on appeal pursuant to provisions contained in the Alabama Rules of Appellate Procedure.

6. Counsel's failure to preserve issues for review by the Supreme Court of Alabama on petition for writ of certiorari to the Alabama Court of Criminal Appeals by failing to comply with appropriate provisions of the Alabama Rules of Appellate Procedure.

The issue of the inadequacy of legal representation was not raised in the trial court, nor was it raised on the petitioner's appeal to the Alabama Court of Criminal Appeals in which the petitioner's trial counsel participated. The petitioner asserts that the inadequacy of his legal representation is clear and apparent on the face of the

record and that it constituted "plain error" which the Alabama Court of Appeals should have noted and considered, *sua sponte*, on its review of petitioner's conviction.[8]

This Court has long recognized that defendants in criminal cases are entitled to "effective assistance of competent counsel," and that counsel's conduct must be "within the range of competence demanded of attorneys in criminal cases". *McMann v. Richardson*, 397 U.S. 559, 770-771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763, 773 (1970). In *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), this Court recognized that the right to effective assistance of counsel in state trials was guaranteed by the due process clause of the Fourteenth Amendment. In its more recent decision in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, ____ L.Ed.2d ____ (1980), this Court strongly reiterated prior decisions and held that a defendant charged with a serious offense must have counsel "able to invoke the procedural and substantive safeguards that distinguish our system of justice", and that a criminal conviction obtained without sufficiently able counsel "unconstitutionally deprives the defendant of his liberty."[9]

Cuyler v. Sullivan, Id., laid to rest any contention that defendants who retain lawyers are entitled to less protection than defendants for whom the state appoints counsel.[10]

---

[8]This case does not involve questions related to standards by which competence is determined. The acts and omissions of petitioner's trial counsel are clearly inadequate under any formulation heretofore enunciated. For example, see the "farce and mockery" doctrine of the Tenth Circuit [**Gillihan v. Rodriguez**, 551 F.2d 1182, 1187, (10th Cir.) cert. den., 434 U.S. 845, 98 S.Ct. 148, 54 L.Ed.2d 111 (1977)] , Second Circuit [**Rickenbacker v. Warden**, 550 F.2d 62, (2nd Cir. 1976) cert. den., 434 U.S. 826, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977)] , and First Circuit [**United States v. Ramirez**, 535 F.2d 125, 129 (1st Cir. 1976)] .

[9]**Cuyler v. Sullivan**, Id., 100 S.Ct. at p. 1715.

[10]Id. at p. 1716. The **Cuyler v. Sullivan** court further acknowledged that decisions made by defendants who retain counsel are "often uninformed" and that there was no basis for drawing a distinction between retained and appointed counsel.

Petitioner recognizes that claims of ineffective assistance of counsel normally are raised for the first time in collateral proceedings because there has not been an opportunity to develop a record bearing evidence on the merits of the allegation of inadequacy of representation. Where, however, a defendant's legal representation is grossly and obviously inadequate - and this inadequacy is reflected on the record - it constitutes "plain error". This Court's decisions in *Silber v. United States*, 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 789 (1962); *Johnson v. United States*, 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943); and, *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936), make clear that the doctrine of plain error encompasses those errors which are obvious, affect the substantial rights of the accused and, if uncorrected, would be an effront to the integrity and reputation of judicial proceedings.

In the instant case petitioner asserts that all of the requirements of the plain error doctrine are met. Petitioner further asserts that where those requirements are met and the "substantial right" which is affected is the right to adequate and effective legal assistance, this Court should now hold that the Constitution demands that such error be noted and considered, *sua sponte*, and that the failure of trial and appellate courts to note such error, *sua sponte*, is an abridgment of the Sixth Amendment right to effective legal assistance of counsel and the Fourteenth Amendment right to due process of law.

While this Court has not ruled on this specific issue, several of the circuits have noted the duty of the trial court to note and consider, *sua sponte*, the inadequacy of a defendant's legal representation, but there is disparity in the application of the doctrine among the circuits.[11]

---

[11]For example, the positions of the Second Circuit as announced in **United States v. Aulet**, 618 F.2d 182 (2nd Cir. 1980) and Fifth Circuit, as announced in **United States v. Stephens**, 609 F.2d 230 (5th Cir. 1980) favor collateral attack as to ineffective assistance of counsel claims which were not raised in the trial court. The Ninth Circuit, in **United States v. Kazni**, 576 F.2d 238 (9th Cir. 1978), recognizes that the failure of the trial court to take note, **sua sponte**, of inadequate legal assistance might

The plain error doctrine is not new to Alabama appellate courts. In fact, the Alabama Court of Criminal Appeals is required by Alabama statute to "consider all questions apparent on the record . . . and enter such judgment as the law demands."[12]

The Alabama Court of Criminal Appeals has held that questions involving the adequacy of a defendant's legal representation - which are not raised at trial - may not be considered for the first time on direct appeal. In *Boyd v. State*, 361 So.2d 1179 (Ala.Cr.App. 1978), the Court of Criminal Appeals addressed the contention that the appellant had been denied his Constitutional guarantees of assistance of effective counsel. This contention, and the court's ruling, are set out as follows:

> " ' [I]n the circumstances of this case, the appellant [contends that he] was denied his constitutional guarantee of individual freedom by denial of assistance of effective and reasonably competent counsel.'
>
> "We do not find that this issue was raised in the lower court, and no ruling of the trial court thereon is here presented.
>
> "Our appellate courts have held that new matter may not be raised for the first time in the appellate courts. Alabama Digest, Vol. 7, Criminal Law, Key No. 1030(1)(2); *Scroggins v. State*, Ala.Cr.App., 341 So.2d 967, cert. denied, Ala., 341 So.2d 972; *Cole v. State*, Ala.Cr.App., 337 So.2d 40, cert. denied, Ala., 337 So.2d 47; *Cooper v. State*, Ala.Cr.App., 331 So.2d 752, cert. denied, Ala., 331 So.2d 759; *Fountain v. Vredenburgh Saw Mill Company*, 279 Ala. 68, 181 So.2d 508; Alabama Digest, Vol. 2, Appeal and Error, Key No. 169. *The Supreme Court, on appeal, will not consider constitutional questions not raised in the court below. Howard v.*

Footnote 11 Continued

constitute plain error, while the District of Columbia Circuit seems to strongly recognize a duty on the trial court to observe and note, **sua sponte**, inadequate assistance of counsel claims under the holding of **United States v. DeCoster**, 624 F.2d 196 (D.C.Cir. 1976).

[12]§12-22-240, **Code of Alabama**, 1975. A copy of this statute is included in the appendix at page 22.

Pike, 290 Ala. 213, 275 So.2d 645; Alabama Digest, Vol. 2, Appeal and Error, Key No. 170(2)."[13] (Emphasis Added).

The Court of Criminal Appeals concluded its opinion in petitioner's case by stating that it had "searched the record for error as required by law and found no prejudicial error." However, the error to which the Court of Criminal Appeals referred was not error committed by petitioner's trial counsel - as it pointed to these errors throughout its opinion - but rather, the Court of Criminal Appeals was referring to error committed by the trial judge. Under the holding reiterated in *Boyd v. State*, Id., the petitioner's inadequate legal representation was not deemed to be error because there was no ruling of the trial court on that issue in the record. Of course, it is obvious that as long as the trial court does not recognize, *sua sponte*, the issue of inadequacy of a defendant's legal representation, there will be few, if any, instances where that issue will ever be presented to the trial court and equally few instances where the Court of Criminal Appeals will find that a defendant has been denied a Constitutional right to effective legal assistance.

The result is a clear federal-state dichotomy involving the constitutional right to effective legal assistance of counsel provided to criminal defendants. In federal courts the responsibility of maintaining proper standards of performance of counsel is placed with the trial judge, in contrast to the Alabama state courts where the issue of effective legal assistance of counsel cannot be raised except by collateral attack on the judgment *after* the defendant's conviction and incarceration. Under Alabama procedure there is little incentive for the trial judge to ever note, *sua sponte*, inadequacy of a defendant's legal representation so long as the Alabama appellate courts hold that the matter cannot be raised for the first time on direct appeal.

In *Lakeside v. Oregon*, 435 U.S. 333, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978), this Court recognized that it is the

---

[13]**Boyd v. State**, Id., at pp. 1180-1181.

judge, not counsel, who has the "ultimate responsibility for the conduct of a fair and lawful trial",[14] and in *McMann v. Richardson*, supra, this Court stated:

> "[J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their court."[15]

Admittedly, defendants who do not raise the issue in the trial courts and, thus, are precluded from raising it on appeal, may resort to collateral attacks on the judgment in state and federal coram nobis and habeas corpus proceedings. However, those proceedings are generally available only after incarceration and, even then, the result is often affected by concerns such as respect for finality of judgments and conservation of judicial resources.[16]

Where, as in the present case, the petitioner's trial counsel participates in appellate proceedings, the need for the reviewing appellate court to note and consider, *sua sponte*, the inadequacy of a defendant's trial counsel - when such inadequacy appears on the record - becomes crucial because a defendant, after the termination of his appeal, may never know the constitutional defectiveness of his legal representation.[17] Accordingly, petitioner submits that under the facts of this case the Alabama Court of Criminal Appeals was constitutionally required to note and consider, *sua sponte*, as plain error the obvious inadequacy of the petitioner's legal representation, and this failure denied petitioner his Sixth Amendment right to effective legal assistance and his Fourteenth Amendment right to due process of law.

---

[14] **Lakeside v. Oregon**, Id., 435 U.S. at pp. 341-342, 98 S.Ct. at p. 1096.

[15] **McMann v. Richardson**, supra, 397 U.S. at p. 771, 90 S.Ct. at p. 1449.

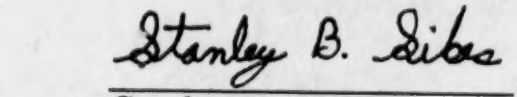
[16] These concerns emerged in **Stone v. Powell**, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

[17] As stated by this Court in **Geders v. United States**, 425 U.S. 80, 88, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976): "Our cases recognize that the role of counsel is important precisely because (the ordinary) defendant is ill equipped to understand and deal with the trial process without a lawyer's guidance." And as was stated by Justice Sutherland in **Powell v. Alabama**, supra, 287 U.S. at p. 69, 53 S.Ct. at p. 64: "Even the intelligent and educated layman has small and sometimes no skill in the science of law * * He requires the guiding hand of counsel at every step in the proceedings

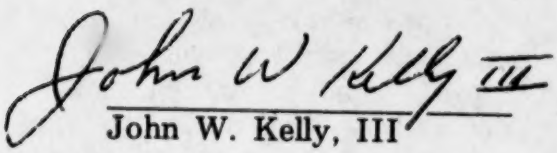
CONCLUSION

For the special and important reasons set out herein, a writ of certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,



Stanley B. Sikes



John W. Kelly, III

Sikes, Kelly, Edwards
& Bryant, P.C.
P.O. Box 1308
Selma, Alabama 36701
(205) 872-6207
Counsel for Petitioner

Footnote 17 Continued

against him . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.". In this case, petitioner was able to retain counsel at the trial and appellate levels and, indeed, has retained counsel relative to this appeal; however, were it not for the fact that petitioner obtained, read and was reasonably able to understand the opinion of the Alabama Court of Criminal Appeals, he could very well be in prison today - - - without ever learning of the constitutional defects which attended his trial.

CERTIFICATE OF SERVICE

I do hereby certify that I have placed three (3) copies of the above and foregoing petition for writ of certiorari, together with the appendix thereto, in the United States mail first-class postage prepaid, correctly addressed to Honorable Charles A. Graddick, Attorney General, State of Alabama, State Capitol, Montgomery, Al. 36130, (the only party required to be served), on this the 21st day of April, 1981.

Stanley B. Sikes

Stanley B. Sikes

80-1793

Office-Supreme Court, U.S.
FILED
APR 21 1981
ALEXANDER L. STEVAS,
CLERK

NO. _____

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

THOMAS RANDALL WATSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

* * *

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF ALABAMA

* * *

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

* * *

Stanley B. Sikes
John W. Kelly, III
P.O. Box 1308
Selma, Alabama 36701
(205) 872-6207

COUNSEL FOR PETITIONER

TABLE OF CONTENTS
TO THE APPENDIX

Opinion of Alabama Court of Criminal Appeals 3
Opinion of Alabama Supreme Court 21
Perjury Statute Under Which Petitioner was Convicted . 22
"Plain Error" Statute Applicable to Alabama Court of Criminal Appeals 22
Alabama Rules of Appellate Procedure:
Rule 10 23
Rule 39 24
Excerpt from Petitioner's Motion for a New Trial 25
Petitioner's Post Conviction Motion for Leave to Subpoena Jurors 27
Petitioner's Post Conviction Amended Motion for Leave to Subpoena Jurors 28
Petitioner's Requested Voir Dire Examination of Jury Venire 30
Ruling on Motion to Quash Count I of Petitioner's Indictment 30
Count II of the Indictment 31
Excerpts from the Testimony of the Witness, M.M. Kennedy, Jr. 32
Excerpts from the Testimony of the Witness, H.E. Mitchell 33
Excerpt from Petitioner's Cross Examination of the Witness, H.E. Mitchell 34
Admission into Evidence of the Tape Recording 34
Excerpts from the Testimony of the Witness Betty J. Maurer 35
Excerpts from Colloquy Among the Court and Counsel Outside the Presence of the Jury 36
Excerpt from Court's Charge to the Jury 37
Excerpt from Petitioner's Closing Argument 37
Excerpts from the Record Relative to Jury Deliberation and Verdict 38

October 7, 1980

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1980-81

1 Div. 76

Thomas Randall Watson
v.
State
Appeal from Monroe Circuit Court

BOWEN, JUDGE

The defendant was indicted and convicted for perjury. Alabama Code Section 13-5-111 (1975). The trial court fixed his punishment at three years in the State penitentiary.

I

To sustain a conviction for perjury there must be testimony of two witnesses to the corpus delicti or one witness with strong corroborative evidence. Ex parte Oglesby, 337 So.2d 381 (Ala. 1976); Murry v. State, 367 So.2d 985 (Ala. Cr. App. 1978), cert. denied, 367 So.2d 989 (Ala. 1979). The defendant maintains that the State failed to meet this burden of proof. We disagree.

Prior to his indictment, the defendant and his wife were the plaintiffs in a civil action for slander against several defendants, including M.M. Kennedy, Jr., the State's key witness here. The indictment charges the defendant with giving perjured testimony at a sworn deposition concerning this civil action. The indictment specifically charges the defendant with falsely swearing at his deposition on November 2, 1978, that he had not had a telephone conversation with Kennedy on July 21, 1978, in which nine tapes, seventy-five thousand dollars and certain

PRECEDING PAGE WAS BLANK

other matters were discussed, "the matters so sworn to being material, and the oath of the said Thomas Randall Watson in relation to such matters being willfully and corruptly false."

M.M. Kennedy, Jr. testified that a telephone conversation between himself, Thomas Andrews and the defendant occurred on July 21, 1978, at approximately 3:15 P.M.:

> "The substance of the conversation was that I was to supply seventy-five thousand dollars to Randall Watson and a bill of sale for a black four wheel drive pickup truck in return for nine tapes which he had of conversations between me and his wife, as well as some pictures."

Kennedy stated that the defendant had informed him that he would deliver a tape recording "of the same nature" to Kennedy's wife, along with pictures of Kennedy and the defendant's wife together, if Kennedy did not produce the seventy-five thousand dollars and the bill of sale for the truck. Kennedy allowed state law enforcement agents to record the July 21st telephone conversation.

Sergeant Gene Mitchell of the Department of Public Safety was present when a telephone conversation between the defendant, Thomas Andrews and Kennedy was recorded shortly after 3:00 P.M. at Kennedy's house on July 21st.

Sergeant Mitchell testified that he and Kennedy listened to the tape at the conclusion of the conversation, and that he could identify each voice in the recording. Mitchell further stated that Ms. Drew Nunnally, a stenographer for the Attorney General's Office, was present on two occasions when he and Kennedy listened to the July 21st tape, and that Ms. Nunnally fully and accurately transcribed the entire recording. This tape was played in the presence of the jury, and, each member of the jury was furnished a transcript of the conversation.

Mrs. Betty J. Maurer was a court reporter. On November 2, 1978, Mrs. Maurer, in her capacity as notary public, placed the defendant under oath and took his deposition at the Monroe County Courthouse. Mrs. Maurer transcribed the entire deposition and read pertinent parts of it into evidence. In the deposition the defendant

absolutely denied that he had a telephone conversation with Kennedy on July 21, 1978: "I haven't talked to him at all." The defendant denied discussing with Kennedy each particular portion of the conversation alleged in the indictment. At the conclusion of Mrs. Maurer's testimony the State rested its case. The defendant's motion to exclude the evidence was overruled.

We find the State's evidence sufficient to prove beyond any reasonable doubt that the defendant is guilty of perjury. The defendant swore under oath at his November 2, 1978, deposition that he had no telephone conversation whatsoever with Kennedy on July 21, 1978. To question after question in his deposition the defendant swore that he had not discussed any of the matters with Kennedy which are averred in the present indictment and which appear in the tape recording of the conversation.

The falsity of the defendant's sworn testimony is proved through M.M. Kennedy, Jr., a witness to the corpus delicti of perjury, who testified that the July 21st conversation did occur and that each particular matter averred in the indictment as the substance of the conversation was discussed between the defendant and himself. A witness to the corpus delicti of perjury is a witness who has independent knowledge of the facts to which the defendant has sworn and who testifies, based on that independent knowledge, that the defendant has perjured himself. Ex parte Oglesby, 337 So.2d at 384.

Although there is no second witness to the corpus delicti, Kennedy's testimony is strongly corroborated. Sergeant Gene Mitchell testified without objection on direct examination that he was present when the July 21st telephone conversation between Kennedy, Andrews and the defendant was recorded. Also without objection, Mitchell testified that the three voices in the taped conversation were those of Kennedy, Andrews and the defendant.

Sergeant Mitchell admitted on his voir dire examination by defense counsel that he could not identify the voices on the tape recording through his own independent knowledge and that his identification of the voices was based on

hearsay. However, the defendant made no motion to exclude Sergeant Mitchell's testimony identifying the voices. No motion to exclude was made, and no questions were proffered concerning Sergeant Mitchell's voice identifications during his cross examination in the presence of the jury. Although the defendant argues that the tape recording should not have been admitted into evidence because the voices on the recording were never properly identified, we must disagree.

To preserve error there must be a timely and appropriate objection prior to the witness's answer to a question or a motion to exclude the answer. Jones v. State, 52 Ala. App. 184, 290 So.2d 251 (1974). Where no objection to a question is made, an answer responsive to the question is not open to objection or motion to exclude. Ayers v. State, 48 Ala. App. 743, 267 So.2d 533 (1972). Ordinarily a witness's testimony becomes legal evidence if it is received without objection. Wilson v. State, 52 Ala. App. 680, 296 So.2d 774, cert. denied, 292 Ala. 759, 296 So.2d 778, cert. denied, 419 U.S. 845, 95 S. Ct. 79, 42 L. Ed.2d 73 (1974). Hearsay evidence which is admitted without objection becomes lawful evidence. Wilder v. State, 52 Ala. App. 157, 290 So.2d 225 (1974). "The fact that evidence which is introduced in a case may be, if objected to, incompetent evidence under some one or more exclusionary rules of evidence does not destroy its probative effect, if it is admitted without objection." Smith v. State, 40 Ala. App. 600, 119 So.2d 202, cert. denied, 270 Ala. 741, 119 So.2d 203 (1960).

It has been held time and again that if during the cross examination of a witness it is developed that the witness's knowledge and testimony on direct examination is based on hearsay, or other inadmissible evidence, the defendant's remedy is to make a proper motion to exclude such evidence from the jury. Oates v. State, 375 So.2d 1285 (Ala. Cr. App. 1979); Allred V. State, 55 Ala. App. 74, 313 So.2d 203 (1975); Smith v. State, 28 Ala. App. 506, 189 So. 86 (1939); Bufkins v. State, 20 Ala. App. 457, 103 So. 902, cert. denied, 212 Ala. 638, 103 So. 906 (1925). Absent such a motion to exclude the trial court cannot be put in

error and the entire testimony of the witness remains with the jury. Oates, supra; Allred, supra; Smith, supra; Bufkins, supra.

Applying these principles of law to the facts, Sergeant Mitchell's voice identifications of Kennedy, Andrews and the defendant were properly allowed to remain before the jury and were strongly corroborative of Kennedy's testimony.

When courts speak of the corroborative evidence required to establish perjury, they mean "proof of material and independent facts and circumstances, which, taken and considered together, tend in confirmation of the testimony of the single witness to establish the falsity of the oath." 70 C.J.S. Perjury §70(c)(1) (1951). As in the case of accomplice testimony, corroborative evidence need not directly confirm any particular fact stated by the accomplice, Wyatt v. State, 51 Ala. App. 226, 283 So.2d 675 (1973), and it need not go to every material fact to which he testifies. Montgomery v. State, 40 Ala. 684 (1867). Corroboration means to strengthen, not necessarily to prove any specific fact about which the accomplice has testified. Smothers v. State, 38 Ala. App. 153, 83 So.2d 374, cert. denied, 263 Ala. 701, 83 So.2d 376 (1955). Yet, unlike the evidence required to corroborate accomplice testimony, the corroborative evidence required to establish perjury must be strong.

Without question, the tape recording and Sergeant Mitchell's testimony "tend in confirmation of the testimony of the single witness to establish the falsity of the oath." On the tape recording itself the parties call each other by name and the name of "Randall" is frequently used by one party in addressing another. These facts and circumstances, coupled with Mr. Kennedy's identification of the voices on the recording, provide sufficient identification of the voices and strong corroborative evidence of the perjury.

We note that the defendant objected to the admission of the tape recording but had no objection to furnishing the jury with copies of the transcript "to better interpret the tape." The transcript identified the speakers by name.

Defense counsel stipulated that the transcript accurately reflected the information on the tape recording. The trial judge gave the defendant every opportunity to object to both the accuracy and the admissibility of the transcript, but no objections were made.

II

The defendant also alleges that the accuracy of the tape recording machine and tapes was not established and that no safeguards were exercised to prevent spoilation of the tape.

M.M. Kennedy, Jr. testified that he listened to the July 21st tape recording immediately after he "hung up the phone" and that the tape "contained the complete telephone conversation" between himself, Andrews and the defendant and that the tape was accurate and that nothing was deleted. "I initialed it and pulled the tabs out so it couldn't be altered." Kennedy stated that he turned the tape over to Sergeant Mitchell and listened to it on two other occasions when it was transcribed. He further stated that he checked the machine to make sure the tape could not be altered after the tabs were pulled out.

On voir dire Kennedy testified again that the three voices on the tape were his own, Andrews' and the defendant's. Kennedy stated that the recorder and the tape belonged to the State of Alabama, and that the tape "came out of a brand new pack." Kennedy further testified that state agents had hooked the recording device to the telephone, but that "I had control of it because I was the one that mashed the button."

Sergeant Mitchell testified that he "was present with the recorder when we turned it on to the recording position" and saw that Kennedy "actually pushed the button on." Sergeant Mitchell stated that the tape cassette was in the same condition at trial as it was when he took it out of the recorder on July 21. Mitchell saw Kennedy remove the tabs from the tape to prevent it from being altered. Mitchell testified that the recorder was tested for accuracy prior to

the conversation: "We had tried it just before this conversation by putting the date on it through the telephone and it was recording - We played it back and it sounded the same as it had." Mitchell tested the tape in several ways and determined that it could not be altered without someone replacing the tabs or modifying the recorder. Mitchell further stated that the tape had been in his possession or in the evidence box since July 21. Mitchell admitted that other personnel within the Department of Public Safety could have had access to the tape, but there was no evidence that the tape had been tampered with or disturbed.

Essentially, we have the same situation here that existed in Sexton v. State, 346 So.2d 1177 (Ala. Cr. App.), cert. denied, 346 So.2d 1180 (Ala. 1977). There we held that the failure of the State to prove that the recording device used to record the conversation was capable of taking testimony was not error where a law enforcement officer testified that after his telephone conversation with the defendant he listened to the recording and found that it accurately and substantially reflected the conversation in which he had participated. Here, also, the tape recording was admitted without error.

III

The defendant next argues that the trial court erred in limiting his cross examination of M.M. Kennedy, Jr. The trial court sustained the State's objections to the following questions propounded to Kennedy from the defendant:

"Q. Let me ask you this, Mr. Kennedy: Did you ever send Randall (defendant) out of town on personal business for yourself so that you could call his wife?"

* * * *

"Q. Did you ever call Mrs. Elaine Watson and try to get her to go out with you while Randall was out of town?"

* * * *

"Q. Did you try to go with his wife, Mr. Kennedy?"

* * * *

"Q. Let me ask you this, Mr. Kennedy: Of your own independent knowledge, does he have any reason to be mad at you?"

The defendant maintains that the foregoing questions were asked to indicate Kennedy's bias against him and cites Proctor v. State, 331 So.2d 828, 830 (Ala. Cr. App. 1976) for the following proposition:

"Where a witness' testimony is of major importance and is strongly adverse to the party against whom he has testified, the usual discretion of a trial court has a narrow range, and it generally is required to allow proof of any important fact indicating bias of the witness."

When Kennedy was called as a defense witness later in the trial he testified that the defendant's wife called him on several occasions and that, after she had called him, he called her and asked her to go out with him. Any error resulting from the sustention of the State's objection was cured and eradicated when defense counsel was later allowed to ask this same question which the trial judge had previously prevented him from asking.

"Q. Mr. Kennedy, I'll ask you this, please sir: Is it not a matter of fact that on many occasions you sent Randall Watson out of town on personal business so that you could make phone calls and try to get with his wife?

"MR. YUNG (Assistant Attorney General):

That's repetitious, Judge. We went over that yesterday.

"THE COURT: I overrule it.

"Q. Answer my question, please, sir.

"A. No, sir."

Thus, it is apparent that the very questions the defendant maintains he was unduly restricted from asking during Kennedy's cross examination were, in fact, asked and answered when Kennedy was called as a defense witness. The bias the defendant argues he was not allowed to prove was in fact proved, definitely and fully. Therefore, any restriction in Kennedy's cross examination became harmless error at most. Alabama Rules of Appellate Procedure, Rule 45 reads:

"No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of

misdirection to the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties." (Emphasis added).

Error, if any, in ruling evidence inadmissible in a criminal proceeding is cured by a subsequent admission of the same evidence. Johnson v. State, 378 So.2d 1164 (Ala. Cr. App.), cert. denied, 378 So.2d 1173 (Ala. 1979); Simmons v. State, 353 So2d 11 (Ala. Cr. App.), cert. denied, 353 So.2d 18 (Ala. 1977). Sustaining objections to certain questions asked during the cross examination of prosecuting witnesses if not harmful error where the defendant is subsequently permitted to ask and receive answers to questions which covered the substance of the questions ruled out. Hill v. State, 366 So.2d 296 (Ala. Cr. App.), affirmed, 366 So.2d 318 (Ala. 1978). The refusal to permit a witness to testify to certain facts does not require a new trial where at another time in the course of the trial the same witness is permitted to testify to those facts. Woodward v. State, 253 Ala. 259, 44 So.2d 241 (1950); Sullivan v. State, 22 Ala. App. 140, 114 So. 73, cert. denied, 216 Ala. 564, 114 So. 74 (1927).

IV

The defendant alleges that reversible error occurred due to certain comments made by the State in closing argument. Those comments are as follows:

"MR. YUNG: '. . . you heard his own voice speaking on that tape so you know what he said over the telephone in that conversation. You have heard the court reporter who took his deposition in this courthouse testify to the lies he then told denying it. What happened in this case was he tried to blackmail Mickey Kennedy by threatening to give those tapes and negatives to...'

"MR. MELSON (Defense Counsel): Move for a mistrial, Your Honor.

"THE COURT: Overrule."

* * * *

"MR. YUNG: '. . . this is no frivolous case. This man in this courthouse raised his right hand to heaven after filing a hundred thousand dollar lawsuit, swore to God Almighty to tell the whole truth and nothing but the truth and lied in his teeth. He's a blackmailing, bald face liar under oath . . .'

"MR. HARDEN (Defense Counsel): Object and move for a mistrial. We move for a mistrial. That is the most improper argument I have ever heard in my life.

"THE COURT: I will sustain the objection and will overrule the motion for a mistrial. Mr. Yung, restrict yourself, please."

The defendant maintains that the references to blackmail in the State's argument was improper and prejudicial. We disagree.

While it is true that evidence of separate crimes is inadmissible where the only probative function of such evidence is to show bad character, or an inclination or propensity to commit the type of crime for which an accused's is being tried, if the accused's commission of another crime or misdeed is an element of guilt, or otherwise tends to prove his guilt, then proof of such other crimes is admissible. Sparks v. State, 376 So.2d 834 (Ala. Cr. App. 1979); C. Gamble, McElroy's Alabama Evidence §69.01 (1) (3rd ed. 1977).

The test of a prosecutor's legitimate argument is that whatever is based on facts in evidence is within the scope of proper comment in argument. Kirkland v. State, 340 So.2d 1139 (Ala. Cr. App.), cert. denied, 340 So.2d 1140 (Ala. 1976). Statements based on facts admissible in evidence are

proper. Henley v. State, 361 So.2d 1148 (Ala. Cr. App.), cert. denied, 361 So.2d 1152 (Ala. 1978). A prosecutor as well as defense counsel has a right to present his impressions from the evidence. He may argue every legitimate inference from the evidence and may examine, collate, sift, and treat the evidence in his own way. Williams v. State, 377 So.2d 634 (Ala. Cr. App. 1979); McQueen v. State, 355 So.2d 407 (Ala. Cr. App. 1978). Evidence of collateral crimes, if properly admitted, may be commented on by the prosecution in closing argument. Hayes v. State, 384 So.2d 623 (Ala. Cr. App.), cert. denied, 384 So.2d 627 (Ala. 1980).

Here, the State's evidence was replete with testimony that the defendant had tried to blackmail Kennedy. Contrary to his position in brief, appellate counsel argued that "some" of this evidence was properly admitted. The July 21st conversation, which the defendant swore never occurred and which subsequently became the basis for his perjury indictment, involved blackmail. Evidence of blackmail was necessarily testified to by Kennedy as the State established its prima facie case. It was not introduced to show the defendant's bad character or that he had an inclination or propensity to commit perjury. The defendant's demand of seventy-five thousand dollars and a black-four wheel drive truck in exchange for not turning over certain tapes and pictures to Kennedy's wife involved blackmail and was the essence of the July 21st conversation.

Applying the facts to the above principles of law we hold that the State did nothing more than comment on facts properly admitted into evidence and that the reference to blackmail was not improper.

Perjury is lying under oath. It is a crime involving willfullness and corruptness. The trial judge so instructed the jury. By referring to the defendant as a "bald face liar", the prosecutor merely used the vernacular to describe the offense with which the defendant was charged. This was a hard blow but it was not foul. We find no error in the prosecutor's remarks and in the action taken by the trial judge. Smith v. State, 344 So.2d 1239 (Ala. Cr. App.), cert. denied, 344 So.2d 1243 (Ala. 1977).

V

At the conclusion of the trial court's oral charge the defendant excepted because the trial court had not charged that, "if you find that any witness has testified falsely, then you may disregard any or all of that testimony." No written charge to this effect was requested. The court's failure to charge was not error.

Where a trial court's instruction to the jury is not as full as counsel desires, his remedy is to request written charges covering the matter omitted. Smith v. State, 262 Ala. 584, 80 So.2d 307 (1955). An objection or exception to the failure of a court to charge on a matter is not necessary where a requested written charge is refused. An exception reaches only what the court did say. Grisham v. State, 147 Ala. 1, 41 So. 997 (1906). Here, the defendant's exception in no way pertained to any misstatement of law. Thus, there is nothing for this Court to review. The mere failure of a court to charge on any given subject in the absence of a proper request presents nothing for review. Jarrell v. State, 251 Ala. 50, 36 So.2d 336 (1948).

The defendant did present a written requested charge after the jury retired to consider its verdict. That charge, in its entirety, is:

> "Whether or not Mickey Kennedy falsely swore as to whether he had a telephone conversation . . ."

This charge is not a statement of law nor even a complete sentence. Since the jury had retired to consider the case when this charge was presented, the request came too late. Key v. State, 8 Ala. App. 2, 62 So. 335 (1913).

VI

The defendant submits that the trial court committed reversible error by using coercive and threatening language in its supplemental comments to the jury. The record does not indicate the exact time the jury began its deliberations on the morning of June 8, 1979. Trial began that morning at 8:00 A.M. The defense called its sole witness, closing

arguments were had and the trial court charged the jury. Then the jury began its deliberations. After the jury had been deliberating, they requested additional instructions at 10:35 A.M. and at 10:55 A.M. The jury was allowed to separate for lunch from 11:50 A.m. to 1:00 P.M. It was at 1:45 P.M. that the following occurred which the defendant contends is error:

> "THE COURT: Ladies and gentlemen, the bailiff has reported to me that you are unable to reach a verdict in this case. Let me say this to you: We were a substantial period in the trial of this matter and I feel that this jury knows as much about the facts in this case as any twelve people that we can put in the jury box in Monroe County. I am completely unwilling at this time to discharge this jury because you say you can't reach a verdict and I would tell you that you should retire to the jury room and sit down and again go over this evidence; I charge you that you should give due consideration to the opinions of other people on the jury, to the end, if at all possible, that a verdict be reached in this case. If a verdict is not reached by you and in the event a mistrial is declared because of the failure of the jury to agree, it means simply that another jury will have to hear the same thing. This is going to entail a lot of expense to the people of this county and this state and I feel like under the facts of this case that reasonable people should be able to agree on a verdict in this case, so therefore, ladies and gentlemen, retire to the jury room and continue your deliberations."

We have carefully considered the case of Orr v. State, 40 Ala. App. 45, 111 So.2d 627 (1958), affirmed, 269 Ala. 176, 111 So.2d 639 (1959), cited by the defendant. After examining the charge as a whole, Whittle v. State, 205 Ala. 639, 89 So. 43 (1921), we do not believe the charge was either coercive or threatening. As in Jones v. State, 56 Ala. App. 444, 322 So.2d 735, cert. denied, 295 Ala. 408, 322 So.2d 741 (1975), the trial court in no way suggested which way the verdict should be returned and the jury had

deliberated only a short time before the above request was made of them. Moreover, it is not error for a trial court to call the jury's attention to the time and expense a new trial would entail. Ashford v. State, 183 Ala. 620, 62 So. 879 (1913); Poellnitz v. State, 48 Ala. App. 196, 263 So.2d 181 (1972). There was no urging as in Orr, supra, that "the court expects a verdict", or that "the taxpayers of this county expect a verdict, not an exhibition of obstinancy."

VII

In his motion for new trial the defendant alleges that the trial court erred in refusing his request number one for voir dire of the jury venire. Request number one reads:

"Is any member of this jury venire related by blood or marriage to either witness in this case?"

The extent and scope of examination of prospective jurors are matters within the sound discretion of the trial judge, and his conduct of the examination, absent abuse of discretion, will not result in reversible error. Radford v. State, 348 So.2d 880, 884 (Ala. Cr. App. 1977); Johnson v. State, 335 So.2d 663 (Ala. Cr. App.), cert. denied, 335 So.2d 678 (1976).

In the instant case there were more than two witnesses who testified; to have asked the requested question verbatim would have been confusing. While the enumerated causes of challenge set out in Alabama Code Section 12-16-150 (1975) are not exclusive, but illustrative, we note that the defendant's request number one does not fall within that section. Beasley v. State, 39 Ala. App. 182, 96 So.2d 693 (1957); Biggs v. State, 20 Ala. App. 449, 103 So. 706 (1924).

Of importance here, however, is the fact that the trial judge did ask the defendant's request number two: "Is any juror personally acquainted with either the witnesses in this case or a member of their immediate family?" This question is broader in scope than defendant's request number one and for this reason was sufficient to uncover any possible bias a prospective juror may have had for or against a particular witness. Substantial error is not

presumed, but the burden is upon the appellant to show error. Aaron v. State, 273 Ala. 248, 139 So.2d 309, 314 (1961). We hold that the trial court did not abuse its discretion.

VIII

Ground 56 of the defendant's motion for new trial alleges that members of the jury panel failed or refused to respond to voir dire questions during jury selection for his trial and that such failure to respond denied him a fair trial. The defendant filed a motion to subpoena jurors to establish these facts. Both motions were denied. The defendant contends these rulings were erroneous.

The rule is well settled that:

> "the failure of a juror to make a proper response to a question regarding his qualifications to serve as a juror, regardless of the situation or circumstances, does not automatically entitle one to a new trial. The proper inquiry in such cases is whether the defendant's rights were prejudiced by such failure to respond properly." Beauregard v. State, 372 So.2d 37, 41 (Ala. Cr. App.), cert. denied, 372 So.2d 44 (Ala. 1979).

However, here the defendant's motions did not comply with the rule stated in Williams v. State, 342 So.2d 1328, 1329 (Ala. 1977).

> A motion challenging the composition of a grand jury, a petit jury, or qualifications of individual jurors, filed after the commencement of trial, must allege, and proof must show, that grounds for the motion were not known to the defendant before he went to trial, or that he could not have known them by exercising due diligence.

See also Smiley v. State, 371 So.2d 469 (Ala. Cr. App. 1979).

Whether the trial court would have granted the motion for a new trial and the companion motion to subpoena jurors if there had been an allegation and proof that the grounds for the motion were not known and could not have been known by the exercise of due diligence is not for our determination, but in the absence of such allegation and proof we are precluded from holding the trial court erred.

IX

In response to the defendant's "Amended Motion for Leave to Subpoena Jurors" filed to supplement the motion for new trial, the State filed the affidavit of juror Eva C. Crowe. The trial judge overruled the defendant's motion to subpoena this juror and the defendant alleges error.

The general rule is stated in C. Gamble, McElroy's Alabama Evidence, §94.06 (1) (3rd ed. 1977):

> "A party's introduction of the juror's affidavit, in support or in impeachment of the verdict, is the equivalent of a direct examination of the juror. The introduction of such an affidavit entitles the opposing party to have the juror brought to court for cross examination."

Yet, here again, the defendant failed to comply with the rule stated in Williams, supra.

We are at a particular loss in reviewing the trial court's order denying the defendant's motion for new trial. The order denying the motion indicates that a hearing was held[1] , but the particulars of that hearing were not

1 "ORDER

"The defendant in this case having filed a motion for new trial, asking that his conviction in this case be set aside and held for naught and that he be granted a new trial on the indictment, and a plenary hearing having been held on said motion, at which the defendant was present in open court in his own proper person and by counsel of his choice, upon due consideration and deliberation, it is ORDERED, ADJUDGED, AND DECREED by the Court that the said motion is due to be, and the same is hereby, DENIED.

"Done this the 30th day of Jan., 1980."

reported although both the State and the defendant were under the impression that the proceedings were to be recorded and transcribed by the court reporter.

The defendant filed a motion to correct the record under Rule 10 (f), A.R.A.P. However, the State could not agree with the defendant's proposed stipulation. The State responded: "[I]t can neither admit and join the appellant's proposed stipulation nor can it propose a different stipulation concerning the December 28, 1979, hearing in this case." It does not appear that this matter was submitted to the trial judge.

Error cannot be based on matters not shown in the record. Shelton v. State, 371 So.2d 451 (Ala. Cr. App. 1979). This Court cannot consider statements contained in the appellant's brief as to facts and events not reflected by the record on appeal. Edwards v. State, 287 Ala. 588, 253 So.2d 513 (1971); Miles v. State, 366 So.2d 346 (Ala. Cr. App. 1978).

On appeal the presumption exists that the ruling denying the motion for new trial is correct. Brooks v. State, 248 Ala. 628, 29 So.2d 4 (1947). In reviewing the refusal of a motion for new trial, this Court will indulge every presumption in favor of the correctness of the trial court. Henley v. State, 361 So.2d 1148, (Ala. Cr. App.), cert. denied, Ex parte Henley, 361 So.2d 1152 (Ala. 1978). Where the record on appeal is silent, it will be presumed that what ought to have been done was not only done, but was rightly done. Robertson v. State, 29 Ala. App. 399, 197 So. 73, cert. denied, 240 Ala. 51, 197 So. 75 (1940).

For the reasons we have stated, this Court cannot find error in the rulings of the trial court on these issues.

We have carefully examined each issue raised in brief and presented at oral argument. In addition, we have searched the entire record for error as required by law and found no prejudicial error. The judgment of the Circuit Court is due to be affirmed.

AFFIRMED.

All Judges Concur.

February 20, 1981

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM 1980-81

Ex parte Thomas Randall Watson

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS

(In re: Thomas Randall Watson

v.

State of Alabama)

80-171

SHORES, JUSTICE.

The Petitioner has not employed either ARAP 10(f) or 39 (k) to present the issue he asserts. Therefore, the merits of his contention are not before us, and we are, therefore, compelled to deny his petition.

WRIT DENIED.

Torbert, C.J., Maddox, Jones, and Beatty, JJ., concur.

PRECEDING PAGE WAS BLANK

PERJURY STATUTE UNDER WHICH PETITIONER WAS CONVICTED

Any person who willfully and corruptly swears or affirms falsely or corruptly procures another to so swear or affirm, in regard to any material matter or thing upon any oath or affirmation authorized by law, except on the trial of any person under an indictment for a felony, shall, on conviction, be imprisoned in the penitentiary for not less than two nor more than five years.

Code of Alabama, 1975, §13-5-111

"PLAIN ERROR" STATUTE APPLICABLE TO ALABAMA COURT OF CRIMINAL APPEALS

In all cases appealable to the court of criminal appeals, the court must consider all questions apparent on the record or reserved in the circuit court and must enter such judgment as the law demands.

Code of Alabama, 1975, §12-22-240

RULE 10
THE RECORD ON APPEAL

[*f*] *Correction or modification of the record.* If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the trial court either before or after the record is transmitted to the appellate court, or the appellate court, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the appelate court.

Code of Alabama, 1975, Vol. 23, Page 436.

RULE 39
REVIEW OF DECISIONS OF COURTS OF APPEAL

[*k*] *Scope of review.* The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to the request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

Code of Alabama, 1975, Vol. 23, Page 474.

EXCERPT FROM PETITIONER'S MOTION FOR A NEW TRIAL

* * * 56. That members of the jury panel failed and/or refused to respond to voir dire questions during jury selection in this cause, said failure on the part of the jury panel has denied the Defendant the right to a public trial by an impartial jury of the state and district wherein the alleged crime was alleged to have been committed in contravention of the Sixth Amendment of the United States Constitution and has thereby deprived the Defendant of his liberty without due process of law as provided by the Fifth Amendment to the United States Constitution and has further deprived this Defendant of his liberty without due process of law as guaranteed to him by the Fourteenth Amendment of the United States Constitution and the laws and Constitution of the State of Alabama. Defendant further shows that if he is not granted a new trial on the above-alleged grounds, he will have been denied the equal protection of the law as guaranteed to him by the Fourteenth Amendment of the United States Constitution and the laws and Constitution of the State of Alabama.

57. That members of the jury selected for the trial of this cause made improper statements of extraneous matters during jury deliberations, said statements on the part of the jury panel has denied the Defendant the right to a public trial by an impartial jury of the state and district wherein the alleged crime was alleged to have been committed in contravention of the Sixth Amendment of the United States Constitution and has thereby deprived the Defendant of his liberty without due process of law as provided by the Fifth Amendment to the United States Constitution and had further deprived this Defendant of his liberty without due process of law as guaranteed to him by the Fourteenth Amendment of the United States Constitution and the laws and Constitution of the State of Alabama. Defendant further shows that if he is not granted a new trial on the above-alleged grounds, he will have been denied the equal protection of the law as guaranteed to him by the Fourteenth Amendment of the United States Constitution and the laws and Constitution of the State of Alabama.

58. That the Defendant is entitled to a new trial in this matter because the trial was conducted in a manner which is inconsistent with due process of law and equal protection of the law and other rights as guaranteed to this Defendant and all defendants under the United States Constitution and the laws and Constitution of the State of Alabama. * * *

(Record, Pages 235-237)

PETITIONER'S POST CONVICTION MOTION FOR LEAVE TO SUBPOENA JURORS

* * *Comes now the Defendant in the above-styled cause and respectfully requests the Court to allow Defendant to subpoena jurors in his motion for a new trial set on August 21, 1979, and as grounds for said motion shows as follows:

1. That certain jurors failed to respond to the voir dire questions of Defendant's attorney during the juror selection process.

2. That Defendant has been informed that at least one juror made improper statements during jury deliberations to the effect that said juror had known Randall Watson all of his life and that the said Defendant had always been in trouble with the law. Defendant alleges that this statement by the juror was highly improper and that Defendant's attorney should be allowed to examine the members of the jury to determine if this statement was made during deliberations.

3. That this motion is made in good faith and not for any improper purpose; that the motion is necessary to insure Defendant of his rights under the United States Constitution and the Constitution and laws of the State of Alabama.

4. Defendant further alleges that if he is allowed to call the jurors as witnesses in his motion for a new trial, he will be able to show that he was convicted by a jury that was not an impartial jury of the state and district wherein the alleged crime was alleged to have been committed, all in direct violation of the Sixth and Fourteenth Amendment of the United States Constitution and the Constitution and laws of the State of Alabama. * * *

"8/27/79 Motion Denied R.E.L. Key, J"

(Record, Pages 239 & 240)

PETITIONER'S POST CONVICTION AMENDED MOTION FOR LEAVE TO SUBPOENA JURORS

* * *Comes now the Defendant in the above-styled cause and respectfully requests the Court to allow Defendant to subpoena jurors in his motion for new trial and as further grounds for this said amended motion shows as follows:

1. That Defendant has been informed that juror, Robert Booker, made improper statements during jury deliberations to the effect that said juror had known Randall Watson all of his life and that the said Defendant has always been in trouble with the law. Defendant alleges that this statement by the juror was highly improper and that Defendant's attorney should be allowed to examine the members of the jury to determine if this statement was made during deliberations. Defendant further shows this Honorable Court that this action is necessary to insure that the Defendant was tried by an impartial jury of the state and district wherein the alleged crime was alleged to have been committed.

2. Defendant further alleges that juror, Robert Booker, is the nephew of Edwin Booker, Sheriff of Conecuh County and that the said juror failed to respond to the voir dire question, "Have you or any member of your immediate family or close personal friend ever been employed by or associated with any municipal, state or federal police force law enforcement agency, prosecutor's office or other governmental agency"? Said failure of the afore-mentioned juror to respond in the affirmative has deprived this defendant of due process of law in violation of the Sixth and Fourteenth Amendment of the United States Constitution and the Constitution and laws of the State of Alabama.

3. That this Honorable Court has refused to grant defendant's attorneys permission to talk to members of the jury that deliberated in the trial of this matter.

4. That in addition to the written requested voir dire questions of the jury panel, Defendant's attorneys requested the Court and the Court responded with a question, in essense, "Have you or any member of your immediate family or close personal friend ever worked for, been employed with, M.M. Kennedy, Jr. or the Monroeville Telephone Company or are you presently employed by the said M.M. Kennedy, Jr. or the Monroeville Telephone Company"? Defendant further alleges that the jurors failed to respond in the affirmative when, in fact, Eva Crowe's husband performed certain work for the said Telephone Company.

5. Defendant alleges if he is allowed to call the jurors as witnesses in his motion for new trial, he will be able to show that he was convicted by a jury that was not an impartial jury of the state and district wherein the alleged crime was alleged to have been committed, all in direct violation of the Sixth and Fourteenth Amendment of the United States Constitution and the Constitution and laws of the State of Alabama. * * *

"8/28/79 Motion Denied R.E.L. Key, J"

(Record, Pages 241-243)

PETITIONER'S REQUESTED VOIR DIRE EXAMINATION OF JURY VENIRE

AT THE CONCLUSION OF THE ABOVE VOIR DIRE, THE COURT, AT THE REQUEST OF THE DEFENDANT, PROPOUNDED THE FOLLOWING QUESTIONS TO THE JURY VENIRE: * * *

THE COURT: Do you have any knowledge of this case or of the defendant and have you formed any opinion as to his guilt or innocence upon the basis of discussion of the case, newspaper reports, or other means concerning the alleged crime?

(No response.) * * *

THE COURT: In looking at this defendant, ladies and gentlemen, as you sit there without having heard a word of testimony in this case, is there any member that cannot presume that he is innocent of the accusation made against him?

(No response.) * * *

(Record, Pages 5 & 7)

RULING ON MOTION TO QUASH COUNT I OF PETITIONER'S INDICTMENT

THE COURT: Let the record show that the defendant refiles his motion to quash the indictment on the grounds of ambiguity and the Court sustains the motion to quash Count One of the indictment against the defendant.

(Record, Page 8)

COUNT II OF THE INDICTMENT

* * *The Grand Jury of said County further charge that before the finding of this indictment, Thomas Randall Watson, also known as Randall Watson, whose name is to the Grand Jury otherwise unknown, on his deposition in a civil action in the Circuit Court of Monroe County, styled, to-wit: Thomas Randall Watson and Elaine Taylor Watson, Plaintiffs, v. Monroeville Telephone Company, Inc., et al., Defendants, Civil Action No. CV-78-90, in which the said Thomas Randall Watson was a plaintiff and one M.M. Kennedy, Jr., also known as Mickey Kennedy, was a defendant, being duly sworn by Betty J. Maurer, Reporter and Notary Public for the State of Alabama at Large, who had authority to administer such oath, falsely swore, in substance and to the effect, to-wit:

> that he had not had a telephone conversation on July 21, 1978, with the said Kennedy in which he told the said Kennedy that he had nine tapes, and in which he told the said Kennedy that he would sign a paper indicating that he had not kept negatives and original tapes, and in which he told the said Kennedy that the phone was tapped and he could not talk on it, and in which the sum $75,000.00 was mentioned,

the matters so sworn to being material, and the oath of the said Thomas Randall Watson in relation to such matters being willfully and corruptly false, against the peace and dignity of the State of Alabama. * * *

(Record, Page 178)

EXCERPTS FROM THE TESTIMONY OF THE WITNESS, M.M. KENNEDY, JR.

*** Q (By State's Counsel) I'll ask you, Mr. Kennedy, whether or not last July 21, 1978 you took part in a telephone conversation with both the defendant, Randall Watson, and Tank Andrews?

A. Yes, sir, I did.

Q. Where were you at the time of that conversation?

A. I was at Gulf Shores, Alabama.

Q. Were both Randall Watson and Tank Andrews on the other end of the line?

A. Yes, sir. ***

Q. Was a state agent there present with you at the time?

A. Yes, sir. ***

Q. Tell the court and the jury, if you would, the substance of what was said between you and Randall Watson and Thomas Tank Andrews during that telephone conversation. ***

A. The substance of the conversation was that I was to supply seventy-five thousand dollars to Randall Watson and a bill of sale for a black four wheel drive pickup truck in return for nine tapes which he had of conversations between me and his wife, as well as some pictures. ***

(Record, Pages 12 & 13)

*** Q. I'll ask you whether or not, Mr. Kennedy, the defendant in this case, Randall Watson here, filed a civil suit against you last year?

A. Yes, he did.

Q. Do you recall when that was?

A. No, I don't.

Q. Was it before or after the July 21st conversation?

A. It was after that conversation.

Q. What type suit was that?

A. A slander suit. ***

(Record, Pages 21 & 22)

EXCERPTS FROM THE TESTIMONY OF THE WITNESS, H.E. MITCHELL

* * *(BY STATE'S COUNSEL) Q. I'll ask you whether or not on July 21st, 1978, at Gulf Shores at Mickey Kennedy's house you recorded a conversation on the telephone between Mickey Kennedy and the defendant, Randall Watson, and one Tank -- Thomas Tank Andrews?

A. Yes, sir. * * *

Q. Did the stenographer, Miss Nunnally, have with her a transcript of this tape recording at that time?

A. Yes, she did.

Q. Did you read it while you listened to the tape?

A. Yes, I did.

Q. Was her transcript accurate in every respect?

A. Yes, sir.

Q. Did it contain a full conversation of that tape?

A. Yes, it did.

Q. Did it properly identify the speakers on that tape?

A. Yes, sir.* * *

(Record, Pages 38 & 41)

EXCERPT FROM PETITIONER'S CROSS EXAMINATION OF THE WITNESS, H.E. MITCHELL

* * *Q. (BY PETITIONER'S COUNSEL) Mr. Mitchell, can you identify the voices on the tape of your own independent knowledge?

A Only as to who the voices were identified to me.

Q In other words, what you are telling this Court, the only way you can identify these voices is through hearsay?

A Yes, sir. * * *

(Record, Pages 47 & 48)

ADMISSION INTO EVIDENCE OF THE TAPE RECORDING

* * *THE COURT: Let the record show that the State offers in evidence State's Exhibit No. 2 for identification; that the defendant objects and the tape is admitted into evidence as State's Exhibit No. 2.

(WHEREUPON, SAID TAPE WAS ADMITTED INTO EVIDENCE AS STATE'S EXHIBIT NO. 2.)***

(Record, pages 84 & 85)

EXCERPTS FROM THE TESTIMONY OF THE WITNESS BETTY J. MAURER

* * *(BY STATE'S COUNSEL) Q. And I'll ask you whether or not as a notary public, state at large, you had authority to administer that oath?

A. Yes, sir, I did.

Q. I'll ask you to describe for the Court and jury exactly what you did and said when you placed the defendant, Randall Watson, under oath.

A. I asked him to raise his right hand . . .

Q. Did he do so?

A. Yes, sir.

Q. Then what did you do?

A. I raised my right hand and I recited -- asked him if he solemnly swore that the testimony he was about to give in the case would be the truth, the whole truth, and nothing but the truth, and he answered, "I do.".

Q. He said, "I do."?

A. Yes, sir.

Q. I'll ask you whether or not then there were certain questions asked of the defendant, Randall Watson, by Attorney Bill Moore?

A. Yes, sir.

Q. Did you take down all of those questions?

A. Yes, sir, I did.

Q. I'll ask you whether or not the defendant, Randall Watson, answered those questions?

A. Yes, sir, he did.

Q. Did you take down the answers?

A. Yes, sir.

Q. How did you go about taking down those questions and answers?

A. On a stenograph machine.

Q. After the conclusion of that deposition what, if anything, did you do to reduce those questions and answers to written or typed form?

A. I typed them myself.

Q. And did you type the entire deposition that was taken on that date, November 2nd, 1978, of the defendant, Randall Watson?

A. Yes, sir, I did.

Q. Do you have that deposition with you today?

A. Yes, sir, I do. ***

(Record, Pages 90 & 91)

EXCERPTS FROM COLLOQUY AMONG THE COURT AND COUNSEL OUTSIDE THE PRESENCE OF THE JURY

THE COURT: * * * I'm not much inclined -- I'll be perfectly honest with you -- at this time to admit any transcript in evidence of a tape conversation where the tape is available. The reason I asked the question about whether or not it was a faithful reproduction or not, I was hopeful that if there had been no argument or any question about it that the parties would agree that the transcript would go to the jury. * * * I think the tape is the best evidence, which is not to say that it might not be helpful to the jury if you all would agree that the transcript would go in. I'm not requiring you to do that or asking you to do that; I'm just suggesting it.

MR. YUNG: Judge, could I explain how this has been done on previous trials?

THE COURT: I understand all about how it has been done in previous trials, Mr. Yung, and I still say that it's hearsay of the rankest kind. *** Do you have any objection to letting the jury be furnished a copy of the transcript to better interpret the tape or not?

MR. HARDEN: Judge, we have no objections. ***

THE COURT: The tape will be admitted then into evidence as State's Exhibit No. 2. Let the record show that by stipulation of the parties, a transcript of the tape will be furnished each member of the jury without the necessity of any further proof as to the correctness of the transcript.

(Record, Pages 59-62)

EXCERPT FROM COURT'S CHARGE TO THE JURY

THE COURT: * * * The material question in this case, ladies and gentlemen, is whether or not the defendant did or did not have a telephone conversation on July 21st, 1978, with one M.M. Kennedy, Jr. * * *

(Record, Page 125)

EXCERPT FROM PETITIONER'S CLOSING ARGUMENT

THE COURT: All right, gentlemen. Go to the jury.)

(Whereupon, Mr. Pearson proceeded to make his closing argument to the jury.)

DURING MR. HARDEN'S CLOSING ARGUMENT TO THE JURY, THE FOLLOWING OCCURRED:

MR. HARDEN: ". . . I hope you won't hold any mistakes that I've made or Mr. Melson has made against Randall. I would like to apologize to Mr. Melson and Randall also for my snap decision that I made in resting our case. I should have conferred with them but I . . ."

MR. PEARSON: We object. That has absolutely . . .

THE COURT: I will sustain the objection. Mr. Harden, that's not permissible argument.

MR. YUNG: Judge, we have no objection to him reopening at this point if he has some more evidence.

MR. HARDEN: Judge, I would object to that and move for a mistrial. That was totally uncalled for.

THE COURT: I overrule the objection, Mr. Harden.

(Record, Pages 112 & 113)

EXCERPTS FROM THE RECORD RELATIVE TO JURY DELIBERATION AND VERDICT

***THE COURT: Mr. Bailiff, please take this to the jury and tell them to commence their deliberations.

(WHEREUPON, THE BAILIFF TOOK ALL OF THE EXHIBITS AND THE TWO FORMS OF VERDICTS INTO THE JURY ROOM.)* * *

(AT 10:35 A.M. THE JURY REQUESTED FURTHER INSTRUCTIONS OF THE COURT, WHEREUPON THE FOLLOWING OCCURRED:)* * *

(AT 10:55 A.M. THE JURY AGAIN REQUESTED FURTHER INSTRUCTIONS OF THE COURT, WHEREUPON THE FOLLOWING OCCURRED:)* * *

AT 11:50 A.M. THE JURY WAS BROUGHT BEFORE THE COURT AND THE FOLLOWING OCCURED:

THE COURT: Ladies and gentlemen of the jury, at this time I want to let you go your separate ways to obtain your noon meal. * * *

AT 1:45 P.M. THE JURY RETURNED TO THE COURTROOM AND THE FOLLOWING OCCURRED:

THE COURT: ladies and gentlemen, the bailiff has reported to me that you are unable to reach a verdict in this case. Let me say this to you: We were a substantial period in the trial of this matter and I feel that this jury knows as much about the facts in this case as any twelve people that we can put in the jury box in Monroe County. I am completely unwilling at this time to discharge this jury because you say that you can't reach a verdict and I would tell you that you should retire to the jury room and sit down and again go over this evidence; I charge you that you should give due consideration to the opinions of other people on the jury, to the end, if at all possible, that a verdict be reached in this case. If a verdict is not reached by you and in the event a mistrial is declared because of the failure of the jury to agree, it means simply that another jury will have to hear the same thing. This is

going to entail a lot of expense to the people of this county and this state and I feel like under the facts of this case that reasonable people should be able to agree on a verdict in this case, so therefore, ladies and gentlemen, retire to the jury room and continue your deliberations.

(WHEREUPON, THE JURY RETIRED TO THE JURY ROOM.) * * * AT 3:45 P.M. THE JURY RETURNED TO THE COURTROOM AND THE FOLLOWING OCCURRED:

THE COURT: Mr. Foreman, I understand that you want to communicate with the Court perhaps with a view toward receiving additional instructions -- is that correct?

JURY FOREMAN: Well, what we really wanted to hear was part of the testimony again, not necessarily from the witnesses themselves but from the court record.***

AT 6:15 P.M. THE JURY RETURNED TO THE COURTROOM AND THE FOLLOWING OCCURRED:

THE COURT:* * * I want to say to you that I appreciate the fact you have been so patient and at this time I'm going to recess you until 8:00 o'clock in the morning. Thank you.

(WHEREUPON, COURT WAS RECESSED.) ***

AT 8:00 O'CLOCK A.M. THE DAY FOLLOWING, THE JURY RETURNED TO THE COURTROOM AND WAS SENT TO THE JURY ROOM FOR A CONTINUATION OF ITS DELIBERATIONS. * * *

At 12:00 noon the jury was recessed, under proper instructions of the Court, to obtain its noon meal and at 1:00 o'clock P.M. returned and resumed its deliberations in the jury room.

At 1:45 P.M. the jury requested that the testimony of M.M. Kennedy which had been previously read to it be re-read. In the absence of the court reporter, it was agreed and stipulated by the State and defendant that the jury would be instructed to decide the case on the testimony before it and thereafterwards the jury, in the presence of

the defendant, the attorneys representing the State and the defendant, was instructed as follows:

THE COURT: Ladies and gentlemen of the jury, it becomes necessary that you decide this matter on the basis of testimony which has been given you in the court and the testimony of M.M. Kennedy which has been previously re-read to you.

I charge you further that it is desirable and important that you agree on a verdict and you should make every effort to do so, consistent with your consciences. You have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment; that each juror must decide the case for himself but only after an impartial consideration of the evidence with his fellow jurors; that in the course of deliberation a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous; that no juror should surrender his honest convictions as to the weight or effect of the evidence solely because of the opinion of his fellow jurors or for the mere purpose of reaching a verdict.

I charge you further to examine any existing differences between you in a spirit of fairness and candor and to reason together and to go over such differences and harmonize them if possible.

If you have not reached a verdict after deliberating a reasonable length of time, you may be discharged if it appears that there is no reasonable probability of agreement. Thank you.***

AT 2:45 P.M. THE BAILIFF REPORTED THAT THE JURY HAD REACHED A VERDICT, WHEREUPON THE JURY WAS BROUGHT INTO THE COURTROOM AND THE FOLLOWING OCCURRED:

THE COURT: Ladies and gentlemen of the jury, have you reached a verdict?

MR. JEAROLD COAKER, JURY FOREMAN: We have, Your Honor.

THE COURT: Hand up the verdict, Mr. Clerk.

(THE COURT READS THE JURY VERDICT AS FOLLOWS:)

THE COURT: "We, the jury, find the defendant guilty as charged in the indictment. Signed, Jearold R. Coaker, Jr., Foreman."

(Record, Pages 130-151)